No. 93-438

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,

Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

GORDON P. ERSPAMER*
PAUL FLUM
JUDITH M. SCHELLY
FRANK H. WU
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
(415) 677-7000
Attorneys for Petitioner Class

WILLIAM C. MORISON-KNOX
SONNENSCHEIN NATH & ROSENTHAL
685 Market Street
San Francisco, CA 94105
(415) 882-5000
Attorneys for Petitioner Reason F. Warehime

MATTHEW L. LARRABEE
STEPHEN M. HANKINS
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, CA 94104
(415) 772-6000
Attorneys for Petitioner National Association of Radiation Survivors

* *Counsel of Record*

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed on page ii of the Petition.

TABLE OF AUTHORITIES

Page(s)

Cases

Cosman v. Principi,
3 Vet. App. 503 (1992) 5

DiBenedetto v. Brown,
1993 U.S. Vet. App. LEXIS 404 (July 7, 1993) 6

Mathews v. Eldridge,
424 U.S. 319 (1976) 2

Meyer v. Grant,
486 U.S. 414 (1990) 10

Parham v. J.R.,
442 U.S. 584 (1979) 3n.1

Riley v. National Fed'n of the Blind,
487 U.S. 781 (1988) 10

Other Authorities

C.F.R. § 19.123 ..... 5n.4

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When this Court remanded in 1985, five Justices agreed that the Court had left open a constitutional challenge to the $10 attorneys' fee limitation as applied to complex claims for veterans' benefits. Following that remand, the parties pursued discovery, and the District Court conducted a two-month trial of the constitutionality of the fee limitation as applied to a class of veterans or their beneficiaries presenting the most complex claims: those arising from exposure to ionizing radiation from atomic bomb testing and atomic bombs dropped on Hiroshima and Nagasaki ("IR Claimants").

Based on the scientific, medical, and documentary evidence presented at trial, the District Court made extensive factual findings describing the operation of the VA claims process as applied to a class of IR Claimants. These findings, distilled from tens of thousands of pages of expert and lay testimony and voluminous trial exhibits, themselves fill over twenty-two pages in the Appendix. (App. 115–37.) These findings detail a claims process of bewildering complexity, fraught with procedural pitfalls and riddled with errors. The District Court accordingly found that the $10 fee limitation, which effectively denies IR Claimants access to attorneys, violates procedural due process and First Amendment rights.

The Ninth Circuit reversed not because it found these findings to be clearly erroneous. Instead, the Ninth Circuit simply ignored the findings, and rested its decision on a stilted view of this Court's prior decision and unreliable indicia of congressional intent. Moreover, the Ninth Circuit created a heightened test for due process violations that deviates from the standard established by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and later cases. As shown in the Petition, these errors are of constitutional significance warranting this Court's intervention. If anything, the government's opposition confirms that, if left to stand, the Ninth Circuit's opinion will create an impossible standard for future due process claimants.

1. While paying lip service to the *Mathews* test, the government's brief demonstrates the breadth of its transformation in this case. For example, the government insists that the Ninth Circuit adhered to *Mathews*'s "risk of erroneous denial" standard, and did not require proof of actual error. According to the government, the Ninth Circuit "merely held" that the district court had failed to determine "how often" the "alleged complexities" in the claims process "would likely cause a claim to be wrongly denied." (Opp. 13.) The government is wrong.

First of all, the government's gloss on the Ninth Circuit's opinion itself rests on a showing of actual error. Any attempt to quantify "how often" the current system "likely" results in a meritorious claim being "wrongly denied" must start with

the identification of actual errors through an examination of individual claims. Only by identifying actual errors on a claim-by-claim basis can the likelihood of their occurrence system-wide be quantified.[1] Thus, notwithstanding the government's attempt at benign characterization, proof of actual error, as opposed to a risk of erroneous denial, forms the basis of the Ninth Circuit's due process analysis.

In addition, the government mischaracterizes petitioners' evidence and the District Court's findings as being limited to the complexity of the IR Claims process. (Opp. at 12.) The District Court found much more than abstract complexity. To cite but a few examples of the numerous shortcomings in the IR Claims processing system documented in the District Court's findings: the VA adjudication system is neither informal nor non-adversarial, as the government claims (App. 130–31); despite the *ex parte* and professedly solicitous nature of the system, the VA "actively discourages" IR Claimants from invoking their right to hearings, which are held in fewer than 6% of the IR Claims (App. 132); the VA performs no independent factual development in the vast majority of IR Claims, resulting in failure to obtain radiation dose estimates or physical exams in 59% and 48% of the claims, respectively (App. 131); the presumptions of service connection set forth in the regulations and touted by the government are in practice "illusory" (App. 129); and the lay service representatives who figure so prominently in the government's defense of the current system are not trained to handle IR Claims and are

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[1] According to the government, proof of error on an individual basis "is not adequate to establish a due process violation, especially on a class-wide basis." (Opp. at 13 n.3.) Carried to its logical conclusion, that argument would require reversal of *Mathews* and its long line of progeny, including *Parham v. J.R.*, 442 U.S. 584 (1979), and *Walters* itself, all of which recognized that due process violations may be established by proof of error on an individual basis. (*See* App. 55.)

consequently of little assistance to IR Claimants. (App. 133–35.)[2]

Indeed, the extent of the Ninth Circuit's transformation of *Mathews* is illustrated by its rejection of the exact type of evidence contemplated by this Court in *Walters*—statistically significant showing of error on a class-wide basis. The District Court found that IR Claimants with counsel were 2400% more likely to prevail than IR Claimants proceeding without counsel. In response, the government speculates, citing only its brief on appeal, that IR Claimants with counsel prevailed because they had stronger cases than unrepresented claimants. (Opp. at 15.) Of course, the government made no such showing below. Nor could such a showing be made without examining the merits of the claims of the unrepresented claimants, once again substituting a showing of actual error for the risk of erroneous deprivation.[3]

Nor did the Ninth Circuit's reformulation of *Mathews* end there. According to the Ninth Circuit, IR Claimants could make out a due process challenge only by showing that

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[2] The government also asserts, without support in the record, that "between 70% and 75% of all IR claims are denied because the claimant did not claim to have a disease that the DVA [Department of Veteran's Affairs] has decided ... can be caused by radiation exposure." (Opp. at 13.) That dubious proposition assumes that unrepresented claimants, proceeding without agency assistance, appreciate the intricacies of medical and scientific issues relating to disease causation. For example, a claimant with multiple cancers, only some of which are covered by DVA regulations, might not list them all on the claim form, thus leading to an erroneous denial. The government also erroneously assumes that claims officers always order medical records and never err during initial claims screening. Moreover, the government overlooks the provision of the DVA Adjudication Procedures Manual M21-1 (Trial Ex. 456) that requires development of a claim only where initial review has revealed a "reasonable probability of a valid claim." In effect, this provision gives the regional office absolute discretion to arrest development of an IR Claim with no further review.

[3] The government belatedly suggests that showing the merits of the underlying IR Claims would not be "the only way" for petitioners to prevail. (Opp. at 14.) Despite this argument, the government fails to suggest any alternative method.

lawyers are strictly "necessary to make the process fair." (Opp. at 10.) Through this sleight of hand, the Court of Appeals was able to reconcile the District Court's findings regarding the undisputed value of legal representation to IR Claimants with its own determination on appeal that denying IR Claimants access to lawyers was consistent with the minimum requirements of due process. The government in turn embraces this standard in defending the fee limitation, even though *Mathews* requires a showing of the probable value, rather than the strict necessity, of additional process. This Court should grant certiorari if for no other reason than to review the propriety of this unprecedented and virtually insurmountable standard for procedural due process.

2. The government asserts that enactment of the Veteran's Judicial Review Act ("VJRA") in 1988 has alleviated the due process issues identified by petitioners. (Opp. at 10–11.) To the contrary, experience under the VJRA reinforces the grave difficulties facing SCDD claimants who proceed without counsel. [4]

Recent decisions by the Court of Veterans Appeals demonstrate the widespread and persistent nature of the procedural deficiencies in the DVA claims process. Passage of the VJRA has not resulted in reformation of DVA procedures. The DVA continues to fail to seek important medical records in processing veterans' claims at the regional level. *See, e.g., DiBenedetto v. Brown*, 1993 U.S. Vet. App. LEXIS 404 (July 7, 1993). The DVA likewise continues to ignore its own regulations and continues to substitute its own unsubstantiated lay opinions "for independent medical

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[4] Furthermore, the government overlooks the changes to DVA regulations since this Court decided *Walters*. These changes have made the SCDD claims process more, rather than less, formal and adversarial. For example, the regulation directing the Board of Veterans' Appeals to give liberal construction to claims has been modified to add a clause stating, "but the Board may dismiss any appeal which fails to allege specific error of fact or law." 38 C.F.R. § 19.123.

evidence" in assessing disability claims. *See, e.g., Cosman v. Principi*, 3 Vet. App. 503 (1992).[5]

While the VJRA permits claimants to hire lawyers on appeal from adverse claims determinations, even that right is denied IR Claimants. Once again, experience under the VJRA shows that claimants need lawyers or other specially trained representatives to present a claim.

Chief Judge Frank Q. Nebeker of the Court of Veterans Appeals has characterized the numbers of veterans proceeding *pro se* as "a serious problem which adversely affects this Court, the community of our nation's veterans, and the achievement of the goals which prompted the 100th Congress to institute judicial review of veterans' benefit decisions." (Letter from Chief Judge Nebeker to Sen. Alan Cranston of 10/23/91 at 1.) Chief Judge Nebeker continued by stating that his court was concerned that

> two-thirds of the veterans who seek judicial review enter an arena controlled by statutory enactments, regulatory provisions, and legal precedents without the assistance of competent, experienced, and trained representatives.

Chief Judge Nebeker identified three "broad categories of potential resources" who could assist veterans: "(1) private practitioners and law students serving pro bono;" "(2) government attorneys ... desiring exposure to and experience in appellate litigation;" and (3) veterans service organizations. (Nebeker letter at 2–3.) Chief Judge Nebeker requested funding for a training program devoted to representing veterans with SCDD claims. (*Id.* at 3.) Congress responded by passing Public Law No. 102-229, which transferred part of the court's appropriation to the Legal Services Corporation to begin the proposed training program.

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[5] These cases are not aberrations. As discussed by amici, there are numerous other cases where the Court of Veterans Appeals has reversed because the DVA failed in its duty to assist the veteran, or misapplied controlling statutes and regulations. (*See* Brief of Amici Curiae Alliance for Atomic Veterans, et al., at 8–9.)

IR Claimants effectively have access to neither counsel nor trained service representatives. As the District Court found, even though service representatives perform a valuable service with respect to SCDD claims in general, they cannot provide an adequate safeguard for IR Claimants. (App. 133–35.) As amicus notes, veterans service organizations which handle other types of SCDD claims do not accept IR Claims. (Brief of Amicus Curiae Swords to Plowshares at 4–5.) Thus, the "serious problem" noted by Chief Judge Nebeker with respect to SCDD claims in general is endemic to the IR Claims-handling process.

3. The government continues to assert a legislative purpose for the fee limitation which is unsupported. As this Court recognized, Congress enacted the fee limitation ostensibly to prevent attorneys' fees from reducing the amount of veterans' benefits received by the claimant. Congress did not enact the fee limitation to preserve the informality of proceedings, as the government argues. (Opp. at 3.) In any event, as the District Court found, after passage of the VJRA in 1988, there is no rational reason for retaining the fee limitation only as to IR Claimants. (App. 141.)[6]

4. Contrary to this Court's teaching on the appropriate use of legislative history, the Ninth Circuit relied on Senate and House Committee Reports concerning proposed bills which were never enacted and which differ significantly from the VJRA as passed. Worse, the Ninth Circuit gave more weight to those Reports' purported findings concerning veterans' benefits generally than it did to the District Court's fact findings concerning IR Claims. Consequently, the government devotes one-third of its argument to an elaborate defense of the Ninth Circuit's novel approach. (Opp. at 16–19.) The government's arguments confirm that the Ninth Circuit has used legislative history improperly to justify its result.

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[6] Moreover, whether or not the VJRA is a "compromise agreement," as the government asserts (Opp. at 18), is beside the point. By definition, IR Claimants are not covered by the VJRA.

The Ninth Circuit ignored a specific congressional finding that IR Claims are "significantly different" from other SCDD claims. Pub. L. 98-542 § 2 (12). The government rationalizes this disregard of the only congressional finding explicitly addressing IR Claims by speculating that by passing the Veteran's Dioxin and Radiation Exposure Act of 1984, Congress intended to provide IR Claimants with fewer procedural protections than other classes of SCDD claimants. (Opp. at 17.) Nothing in either the 1984 Act or the VJRA supports such a notion.

The government also argues that the 1984 Act required "the DVA to provide additional guidance to its claims officers who investigate and rule upon IR Claims." (Opp. at 17.) The government's argument does not advance its cause. The District Court's fact findings show that, despite the 1984 Act, the DVA procedures are seriously deficient, and denial of access to lawyers violates due process. (*See* App. 116–119, 130.)

5. Notwithstanding the history of this litigation and the large number of veterans who are affected, the government continues to attempt to minimize its significance. In a lengthy footnote, which has no support in the record, the government disingenuously seeks to reduce the size of the certified class. The government concedes that the class consists of at least 15,417 members, but argues based on a series of unsupported assumptions that the fee limitation actually affects only 576 persons. (Opp. at 11 n.2.)

The government's argument rests on a series of false factual premises. The government begins by asserting without record support that only 4,856 IR Claimants asked the DVA to determine whether they were eligible for readjudication of their claims. The government's assertion, even if accurate, ignores the fact that many claimants may not have received notice of their right to request readjudication, or that the pendency of this appeal may have deterred claimants from pursuing that right.[7]

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[7] Should this Court reverse, petitioners intend to ask the District Court to amend its judgment to permit additional requests for readjudication.

The government then cuts that figure nearly in half, to 2,743, based on the DVA's determination of eligibility. Given the DVA's abominable error rate and the adversarial nature of its proceedings, it would be ironic if the government's self-serving determination of eligibility were used to deny review by this Court.

The final reduction to 576 is based on the government's unilateral action in "suspend[ing] readjudication of IR Claims in light of the court of appeals' decision." (Opp. 11 n.2.) By that logic, had the government acted to suspend readjudications sooner, the class of affected claimants would have been reduced to zero.[8]

But even assuming the government has correctly characterized the size of the class, this Court has never held that a due process violation is constitutionally insignificant merely because it affects only a small number of individuals. To the contrary, Justice O'Connor specifically noted in *Walters* that on remand, the District Court "should consider any individual claim" that the fee limitation violates procedural due process. (App. 55.) The certified class of IR Claimants is due no less.

6. Finally, the government fails to address why petitioners' claims of First Amendment violations should be analyzed, as they were by the Ninth Circuit, under a standard more lenient than traditional First Amendment scrutiny. In choosing to sidestep the substance of petitioners' First Amendment arguments, the government misses two critical points.

First, the government has never contested that the fee limitation restricts First Amendment freedoms. The

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[8] The government does not help its position by arguing that "it should be kept in mind" that IR Claimants fall outside the categories of presumptive eligibility for benefits that Congress created for radiation exposure. (Opp. at 11 n.2.) As the District Court found, the point of petitioners' due process challenge is that IR Claimants have erroneously been denied benefits. (App. 101.) That 49% of IR Claimants do not fall within the categories of presumptive eligibility simply means that their cases are especially difficult. Consequently, their need for lawyers is especially acute.

government's assertion that this Court previously "rejected" petitioners' First Amendment claims (Opp. at 18) must itself be rejected to the extent that it obliquely argues that the First Amendment is not implicated by the fee limitation. Neither this Court, nor the Ninth Circuit, nor the government itself has ever so indicated.

Second, the government ignores two opinions issued by this Court after *Walters*, each of which seriously undermines the government's position. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Meyer v. Grant*, 486 U.S. 414 (1990). Both *Riley* and *Meyer* hold that any government restriction on an individual's ability to hire assistance in the exercise of First Amendment freedoms must be narrowly tailored to serve a compelling government interest. *Riley*, 487 U.S. at 789 n.5; *Meyer*, 486 U.S. at 424. As if *Riley* and *Meyer* did not exist, the government argues that the First Amendment is satisfied unless the fee limitation forecloses any opportunity to make a "meaningful presentation of IR Claims." (Opp. at 18–19.) This standard was expressly disapproved in *Meyer* and contradicts decades of this Court's distinct treatment of First Amendment claims. Review by this Court is therefore warranted.

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GORDON P. ERSPAMER *
PAUL FLUM
JUDITH M. SCHELLY
FRANK H. WU
MORRISON & FOERSTER
Attorneys for Petitioner Class

MATTHEW L. LARRABEE
STEPHEN M. HANKINS
HELLER, EHRMAN,
WHITE & MCAULIFFE
Attorneys for Petitioner National Association of Radiation Survivors

WILLIAM C. MORISON-KNOX
SONNENSCHEIN NATH & ROSENTHAL
Attorneys for Petitioner Reason F. Warehime

* *Counsel of Record*